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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ANGEL MONTERO AVILA,<br>Defendant and Appellant. | G040311<br>(Super. Ct. No. 06NF0195)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant appeals on the basis there was insufficient evidence to support his second degree murder convictions because the evidence failed to show he subjectively knew his driving was dangerous to human life. We disagree and affirm.

I

FACTS

Defendant was charged with three counts of second degree murder and one count of petty theft with a prior conviction. A jury found defendant guilty as charged and he was sentenced to a total of 45 years to life.

On the evening of January 13, 2006, defendant and two others, a neighborhood acquaintance of defendant's named Fernando Fructoso Hernandez and a friend of Hernandez's named Ismael, drove in defendant's minivan to a liquor store in Placentia and bought two six-packs of beer. The three then drove to Ismael's house where defendant and Ismael drank the beer over the course of an hour and a half to two hours.

The three then drove to the Diamante Bar in Fullerton. There, defendant and Ismael consumed 10 standard sized bottles of beer between them over an hour to an hour and a half. Hernandez drank only a soda, and at some point during the evening left defendant and Ismael to sleep in the minivan, parked outside the bar.

The bartender, Maria Lopez, left a bottle of Grand Marnier and a bottle of Don Jose Tequila sitting on the bar. She saw defendant leave the bar quickly with the bottles without paying for them. Defendant entered the minivan and handed the bottles to Hernandez. The bar's security guard ordered defendant to stop, as defendant drove quickly away. Ismael was left behind at the bar.

The minivan was seen by Fullerton Police Officer Gary Sirin running a red light at the intersection of Orangethorpe and Euclid. Sirin followed the minivan and observed it run two more red lights on its way to the on-ramp of the 91 Freeway. A number of vehicles sounded their horns at the minivan as it ran the red lights. As the

minivan approached the on-ramp, Sirin activated his patrol car's lights and siren to initiate a traffic stop.

The minivan continued onto the freeway, where Sirin observed that it initially traveled around 50 miles an hour, before suddenly swerving into lanes one and two, going back and forth between them, then accelerating to around 80 miles an hour. Hernandez testified that, while on the freeway, he felt fearful and asked defendant a number of times to stop driving and pull over. Around this time, the siren of Sirin's patrol car stopped working. The minivan then swerved across the other lanes of traffic to exit at the Raymond off-ramp, weaving between a large truck and another car, at which point Sirin lost sight of it.

While exiting at the Raymond off-ramp, Sirin observed dust and debris rising from the left shoulder, leading him to conclude the minivan had left the road and traveled along the dirt shoulder at some point. When Sirin reached the intersection at the foot of the off-ramp, he saw the minivan had struck another car that was waiting at a red light at the base of the off-ramp. That car contained five people; three were killed and two were injured, one seriously. Sirin got out of his patrol car and was approached by a bystander who told him he had seen the driver of the minivan exit the van and run south. Defendant was apprehended by police soon after, at approximately 10:30 p.m. Forensic testing of defendant's blood was undertaken at 1:00 a.m. and indicated he had a blood-alcohol level of .128 percent.

## II

## DISCUSSION

Defendant appeals from his three convictions for second degree murder on the basis they were not supported by substantial evidence. Specifically, defendant argues there was insufficient evidence he had the necessary malice.

Murder requires "malice aforethought." (Pen. Code, § 187, subd. (a).) Such malice may be implied when "the circumstances attending the killing show an

abandoned and malignant heart." (Pen. Code, § 188.) Case law has interpreted this ambiguous statutory language in the following way — the test as to whether a defendant had the implied malice necessary for a second degree murder charge is whether or not the defendant was subjectively aware that he or she was engaged in conduct that endangered the life of another. (*People v. Knoller* (2007) 41 Cal.4th 139, 143.)

Defendant cites a number of cases (herein referred to as the *Watson* cases, after *People v. Watson* (1981) 30 Cal.3d 290; the authority on the vehicular second degree murder cases cited by defendant) in which the defendant drivers were found to have driven with conscious disregard for human life and therefore found guilty of second degree murder.[1]

In each of the *Watson* cases, there was some combination of a number of the following factors: (1) the drivers were intoxicated (generally with alcohol; sometimes with PCP or marijuana or a combination thereof); (2) the drivers previously had been convicted of drunk driving; (3) the drivers previously had attended education programs warning them of the dangers of drunk driving; (4) the drivers had been involved in some sort of previous traffic related accident; (5) the drivers drove at excessive and dangerous speeds; (6) the drivers drove erratically; (7) the drivers were fleeing the police; (8) the drivers had at least one other collision or near miss prior to the fatal collision to put them on notice of the danger of their driving; and (9) the drivers knew of the poor state of repair of their vehicles. Defendant's argument is that the instant case is distinguishable from the *Watson* cases because there are not as many of the above factors present in his case as there were in the others.

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[1] The *Watson* cases are *People v. Watson*, *supra*, 30 Cal.3d 290; *People v. Contreras* (1994) 26 Cal.App.4th 944; *People v. Murray* (1990) 225 Cal.App.3d 734; *People v. Olivas* (1985) 172 Cal.App.3d 984; and *People v. Albright* (1985) 173 Cal.App.3d 883.

Citing almost the exact same cases as defendant, the defendant in *People v. David* (1991) 230 Cal.App.3d 1109 presented the court with the same argument: "[Defendant] contends the evidence in this case is insufficient to establish implied malice. He supports this argument by pointing to specific evidence which was present in those cases which he contends is missing here. This argument is unpersuasive." (*Id.* at p. 1114.) The court in *David* found that, despite the defendant not having any near collisions and the absence of other factors present in other vehicular homicide cases, the "pattern of [defendant's] driving showed [defendant's] awareness of the surroundings." (*Id.* at p. 1116.) Presented with the same argument, we apply the same reasoning to draw the same conclusion and find defendant's argument similarly unpersuasive.

Defendant cites the *Watson* cases, in which drivers have been found to have had the implied malice necessary for second degree murder, and lists the factors absent in this case but present in those, and asserts that these determine whether implied malice was present. It has been specifically held this is *not* the method by which one determines whether or not a defendant had implied malice for the purpose of second degree murder: "[N]owhere does the opinion in *Watson* state that all of the factors present in that case are necessary to a finding of second degree murder. Rather, the opinion states that the presence of those factors was sufficient *in that case* to support a murder conviction. . . . [¶] One commentator has argued that a 'major flaw' in *Watson* is the omission to state which (if any) of the factors present in that case are the *sine qua non* of implied malice. [Citation.] Olivas argues that *Watson* must be read very strictly to require all of those for a second degree murder conviction, in order to avoid unconstitutional vagueness in the homicide statutes. [¶] However, we read *Watson* as deliberately declining to prescribe a formula for analysis of vehicular homicide cases, instead requiring a case-by-case approach. If the Supreme Court had intended the factors in *Watson* to be required in all cases for a second degree murder conviction, it presumably would have said so. Instead, the court simply described the distinction between vehicular manslaughter and vehicular

second degree murder, and applied the law to the particular facts in that case. Admittedly the distinction drawn in *Watson* between the two offenses is so subtle that it could easily be lost in application without a checklist to follow. The case-by-case approach, however, is all the Supreme Court has given us." (*People v. Olivas, supra,* 172 Cal.App.3d at pp. 988-989.)

Cases since *Watson* and *Olivas* have applied this reasoning and held that the "case-by-case approach," rather than looking for the "*sine qua non* of implied malice," is the correct method by which the presence of implied malice in vehicular homicide cases is determined. (See *People v. Contreras, supra,* 26 Cal.App.4th at pp. 954-955; *People v. Murray, supra,* 225 Cal.App.3d at p. 749.)

In deciding whether a driver had the requisite implied malice for a second degree murder conviction in a vehicular homicide case, the court is to look at the pattern of the defendant's driving as a whole. Such was held by *People v. McCarnes* (1986) 179 Cal.App.3d 525: "Defendant claims that his driving was far less dangerous than the defendants in the vehicular murder cases of *Watson, supra,* [30 Cal.3d 290] and *People v. Fuller* (1978) 86 Cal.App.3d 618, where the defendants drove at higher speeds and ran through red lights. This contention is absurd. The case at bench, unlike *Watson* or *Fuller*, presents a portentous *pattern* of reckless, high-speed passing maneuvers on two-lane roads, involving repeated and deliberate driving into oncoming traffic, and culminating in a head-on collision." (*Id.* at pp. 534-535, fn.omitted.) Although the quality and quantity of the above factors from the *Watson* cases are relevant to whether or not a defendant had implied malice, we interpret the above authority as holding that the absence of no one or more particular factors is fatal to a finding of implied malice — it is the *overall pattern* that determines implied malice.

The facts that constitute the pattern of defendant's driving on the evening of the fatal collision are these: (1) he ran a number of red lights; (2) he was fleeing the scene of a crime; (3) the police were pursuing him; (4) he was intoxicated and intended to

drive so; (5) his passenger warned him he should stop driving and pull over; (6) other motorists sounded their horns at him, thus warning him of the danger of his driving; (7) he drove back and forth between lanes on the freeway; (8) he swerved across the other lanes of traffic to exit the freeway; and (9) he left the off-ramp and traveled along the dirt shoulder immediately before the fatal collision. From these facts, a jury could reasonably infer defendant was aware of the danger to human life his driving created.

In fact, defendant drivers have been found to have had the implied malice necessary for second degree murder on the weight of less than this, as in *People v. David*, *supra*, 230 Cal.App.3d 1109: "Here appellant several times crossed the double-double yellow center lines into oncoming traffic, forcing oncoming traffic out of its lanes to avoid a collision. Appellant had a near collision with a woman in a crosswalk with two children and a shopping cart. Appellant was pursued by a sheriff's vehicle with a red light and flashing amber lights. From these events the trier of fact could infer appellant's awareness of the risk."[2] (*Id.* at p. 1116.)

Similarly, in *People v. Watson*, *supra*, 30 Cal.3d 290: "[W]e believe that there exists a rational ground for concluding that defendant's conduct was sufficiently wanton to hold him on a second degree murder charge. The facts upon which we base this conclusion are as follows: Defendant had consumed enough alcohol to raise his blood alcohol content to a level which would support a finding that he was legally intoxicated. He had driven his car to the establishment where he had been drinking, and he must have known that he would have to drive it later. It may also be presumed that defendant was aware of the hazards of driving while drinking while intoxicated. . . . Defendant drove at highly excessive speeds through city streets, an act presenting a great

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[2] The defendant in *People v. David*, *supra*, 230 Cal.App.3d 1109 was also under the influence of phencyclidine (PCP). He had two prior convictions for driving under the influence of PCP and had attended a mandatory education program regarding the risk of driving under the influence. (*Id.* at p. 1112.)

risk of harm or death. Defendant nearly collided with a vehicle after running a red light; he avoided the accident only by skidding to a stop. He thereafter resumed his excessive speed before colliding with the victims' car . . . . In combination, these facts reasonably and readily support a conclusion that defendant acted wantonly and with a conscious disregard for human life." (*Id.* at pp. 300-301.)

That far fewer facts than those in the instant case can allow the inference that implied malice existed was also held in *People v. Autry* (1995) 37 Cal.App.4th 351: "As recently summarized in *People v. Talamantes* (1992) 11 Cal.App.4th 968, 973, these [drunk driving murder conviction] cases have relied on some or all of the following factors in upholding such convictions: (1) blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving. As in *Talamantes*, all four factors are present here, and appellant cites no case where a drunk-driving-murder conviction has been reversed for insufficient evidence.' [Citation.]" (*Id.* at p. 358.) Although it would not necessarily determine the issue, it does not help the instant defendant that he too does not cite any cases in which a drunk-driving-murder conviction has been reversed for insufficient evidence.

Defendant specifically argues the absence of evidence of prior drunk driving convictions and attendance at driver educations programs, not having had previous traffic accidents, no evidence he drove at excessive speeds or had any collisions or near misses prior to the fatal collision, and no evidence he heard the police siren, distinguishes the instant case from the others. None of these factors are so fundamental, and there are not enough of them, to so distinguish the instant case and persuade us that a different result should be found. These factors are not the *sine qua non* that defendant asserts. We discuss each of the features defendant claims distinguish the instant case from other second degree vehicular murder cases below.

*A. Prior Drunk Driving Convictions and Attendance at Driver Education Programs*

Defendant argues he was less aware of the dangers of his driving on the night of the collision because, not having had a drunk driving conviction in the past or attended an education program regarding drunk driving, he was less aware of the dangers of driving drunk.

*People v. Murray*, *supra*, 225 Cal.App.3d 734 cites two cases as authority that evidence of attendance at driver education programs can give rise to the inference a drunk driver had subjective awareness of the danger of driving drunk on a subsequent occasion. (*Id.* at p. 744.) Those cases are *People v. Brogna* (1988) 202 Cal.App.3d 700 and *People v. McCarnes*, *supra*, 179 Cal.App.3d 525. However, neither case suggests that *not* having participated in a driver education program necessarily means a driver is any less aware of the dangers of drunk driving; in fact the cases imply otherwise. *McCarnes* expresses how self-evident the dangers of drunk driving are: "[T]he reason that driving under the influence is unlawful is *because* it is dangerous, and to ignore that *basic proposition*, particularly in the context of an offense for which the punishment for repeat offenders is more severe [citation], is to make a mockery of the legal system as well as the deaths of thousands each year who are innocent victims of drunken drivers." (*Id.* at p. 532, first italics in original, second italics added.) And as reiterated in *People v. Brogna*, *supra*, 202 Cal.App.3d 700: "As recognized by the court in *McCarnes*, driving under the influence constitutes a criminal offense precisely because it involves an act which is *inherently dangerous*. [Citation.] That simple fact has been made well known to all segments of our society through virtually every form of mass media." (*Id*. at p. 709, italics added.)

Defendant argues that his lack of attendance at driver education programs made him less aware of the risks of drunk driving. However, other factors present on the night of the collision, such as his being expressly warned of the danger of his driving by Hernandez, serve the same purpose. That a warning from a passenger regarding a

defendant's dangerous driving can be comparable to a formal education program warning the same was held in *People v. Autry, supra,* 37 Cal.App.4th 351: "[A]ny weakness in appellant's prior formal education pales into insignificance in light of the graphic evidence from appellant's passengers, who desperately warned appellant, at the very time of driving, that appellant was driving dangerously and should let [passenger] drive because they did not want to be killed." (*Id.* at p. 359.) We view defendant's lack of attendance in driver education programs in this light and accordingly it was entitled to little evidentiary weight.

Although *People v. Murray, supra,* 255 Cal.App.3d 734 and the cases it cites hold that a defendant's prior drunk driving convictions and attendance at driver education programs are relevant as to whether a defendant knew of the danger he or she created when he or she became drunk and drove on a subsequent occasion, these cases did not mean to suggest that lack of such previous convictions or education programs indicates a defendant had no knowledge of the risks of drunk driving.[3] For us to hold otherwise would be an affront to the tens of thousands of California drivers who, through commonsense and basic human civility, are aware of the dangers of driving while drunk and do not need a drunk driving conviction or education program to make them so aware.

Drivers who intoxicate themselves, knowing they will later drive, are not entitled to claim that, because they had never been caught doing so before, had no idea

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[3] Other cases have expressly rejected such a contention. *Taylor v. Superior Court* (1979) 24 Cal.3d 890 states: "[W]hile a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, *we do not deem these aggravating factors essential prerequisites* to the assessment of punitive damages in drunk driving cases." (*Id.* at p. 896, italics added.) *Taylor* was a personal injury action referring to punitive damages against a drunk driver. Although not authoritative, it informs the instant case because it also discusses the weight given to prior drunk driving convictions in determining a driver's knowledge of the danger of driving drunk on a subsequent occasion.

how dangerous it was — they are not entitled to a free warning in the form of a previous drunk driving conviction, and we will not offer defendant the same.

That defendant got drunk knowing he thereafter would operate his motor vehicle can be inferred from the fact defendant drove to his companion Ismael's house, where he became "a little drunk," then drove to the Diamante bar and continued to drink. That such facts can lead to the inference defendant intended to get drunk and drive was held in *People v. Murray, supra,* Cal.App.3d at p. 746: "On the fateful day . . . appellant deliberately chose to drive his truck to work so that he could attend the drinking party after work. He deliberately chose to drink and drive, knowing that after the party he would have to drive a long distance home from Hawthorne to Lancaster. This is like *Watson, supra,* 30 Cal.3d at page 300, where the defendant drove his car to a bar and 'must have known that he would have to drive it later.'" (*Ibid.*)

*B. Prior Traffic Accidents*

Defendant cites no authority for his argument that not having had a previous traffic accident makes him less aware of the dangers of driving recklessly. Absent authority to the contrary, we apply the same reasoning to this argument as that we apply to the argument that not having a prior drunk driving conviction makes one less aware of the danger of drunk driving, and reject it accordingly. (*American Internat. Specialty Lines Ins. Co. v. Continental Casualty Ins. Co.* (2006) 142 Cal.App.4th 1342, 1359.)

The argument that not having been involved in any traffic-related accidents in the past means defendant was less aware of the danger of his driving is not only without authority, but counterintuitive and illogical; it is rejected.

However, as the court did in *American Internat. Specialty Lines Ins. Co. v. Continental Casualty Ins. Co., supra,* 142 Cal.App.4th at page 1359, "we analyze the issue, but the exercise is academic." Tens of thousands of California drivers have never

been in a traffic accident and this does not make them any less aware of the dangers of driving recklessly. In fact it may well be that the reason they have not been involved in any accidents is *because* they are well aware of the dangers of driving recklessly and are even more cautious on the road as a result. And the jury could just as easily assume the same of defendant. That is, a logical inference for the jury to draw from the fact defendant had not been in a prior traffic accident is that he had not been in an accident before *because* he was well aware of the dangers of reckless driving and had, up until the evening of the fatal collision, driven carefully to avoid such accidents. The argument that defendant did not know the risk to human life of driving dangerously because he had not had any prior traffic accidents is unpersuasive and the jury was entitled to so find.

*C. Driving at Excessive Speeds & Other Collisions or Near Misses*

In *People v. Murray, supra,* 225 Cal.App.3d 734, the defendant argued, because he did not have any near misses before the fatal collision, he was not aware of his dangerous driving, as defendant similarly argues in the instant case. The *Murray* court rejected this argument in the following way: "Appellant claims this case contrasts with *Olivas, supra,* 172 Cal.App.3d at page 989, where the defendant struck another car before the fatal collision and with *People v. Watson, supra*, 30 Cal.3d at page 301, where the defendant nearly collided with another vehicle and skidded to a stop before resuming driving. Appellant contends there were no such preliminary collisions here to make appellant aware of his dangerous driving. The evidence here was nevertheless sufficient." (*Id.* at p. 746.)

The relevance of whether or not a defendant driver had any other collisions or near misses before the fatal collision is that other collisions or near misses will serve to "make [them] aware" of their dangerous driving and put them on notice of the risk they are creating. (*People v. Murray, supra,* 225 Cal.App.3d at pp. 746-747.) Such was the holding in *People v. Olivas, supra,* 172 Cal.App.3d 984: "[T]he preaccident collision

may have been minor, but it was certainly sufficient to apprise Olivas of the risk he was creating. . . . Olivas was further apprised of the risk when he nearly collided with two more cars while running the first red light." (*Id.* at p. 988)

Although the record does not conclusively show defendant had any collisions or near misses to put him on notice of his dangerous driving, there are a number of other facts on the record from which the jury could infer defendant was otherwise made aware of his dangerous driving. These facts are: a number of other motorists sounded their horns at him, he was being pursued by a police officer (the relevance of which is discussed below), and he was expressly warned of how dangerously he was driving by his passenger, Hernandez. These facts, in combination, allow the inference that defendant was put on notice of the danger of his driving in the same way a collision or near miss would have. Therefore the jury was entitled to give the fact defendant did not have another collision or near miss little weight.

Defendant also argues that he was not driving at an "excessive or dangerous speed" and drove under or at the speed limit while being pursued, and that this suggests he was not aware of the danger of his driving. It is true that dangerous speeds are a common factor in most of the second degree vehicular murder cases, but it is still only one of many factors that have created the inference that a defendant driver knew the danger of his or her driving and is not, of itself, fundamental to a finding of implied malice. As was stated in *People v. Contreras, supra,* 26 Cal.App.4th 944: "A finding of implied malice must be based upon 'consideration of the circumstances preceding the fatal act. [Citations.]' [Citation.] [¶] Thus, the absence of intoxication *or high speed flight* from pursuing officers *does not preclude a finding of malice*. These facts merely are circumstances to be considered in evaluating culpability." (*Id.* at pp. 954-955, italics added.)

*D. Police Siren*

The argument there was no evidence defendant heard the police siren, and this made him less aware of the dangers of his driving, fails for two reasons. First, although Hernandez testified he did not hear the police siren, he did testify he saw the police car and, when they were travelling on the freeway, that he saw the police car turn on its red lights. Therefore, the jury was entitled to infer from the fact Hernandez saw the police car and its flashing lights, that defendant did also. Nothing on the record states the police car's *lights* ceased working, only the siren. So the jury could accept defendant didn't hear the siren and still reasonably conclude he saw the police car and its flashing lights and therefore knew he was being pursued by the police.

Second, defendant places much emphasis on how carefully he had been driving on the evening of the collision; he relies on facts such as how he was not driving at an excessive or dangerous speed (in fact that he was driving particularly slowly at times), that he had no other collisions or near misses, and that he did not hit the van and trailer he drove between. If we accept defendant was driving as cautiously as he suggests, then it follows he would have also heard the police siren. Although the police car's siren ceased working during the pursuit, the police car had already been pursuing defendant for some time before this happened, giving defendant plenty of time to see and hear he was being pursued. It does not make sense that defendant was driving as carefully as he suggests but did not hear the police siren; the jury was entitled to infer from the picture he paints of his driving that he heard the police siren. Therefore, the evidence presented at trial supports the inference defendant heard the police siren.

Defendant also argues (we assume as an alternative to the argument he didn't hear the police siren) evading the police is not a felony inherently dangerous to human life in the abstract and cites *People v. Howard* (2005) 34 Cal.4th 1129 as authority. *Howard* is inapplicable to the instant case for two reasons. First, *Howard* states that evading the police is not an inherently dangerous felony *in the abstract*: "'In

determining whether a felony is inherently dangerous [under the second degree felony-murder rule], the court looks to the elements of the felony *in the abstract*, "not the 'particular' facts of the case," i.e., not to the defendant's specific conduct.' [Citation.] That is, we determine whether the felony 'by its very nature . . . cannot be committed without creating a substantial risk that someone will be killed . . . .'" [Citations.]" (*Id.* at p. 1135.)

To look at a crime in the abstract is to look at the elements of the offense itself and *not* the circumstances of the particular case. Because in the instant case we are determining the *subjective* state of mind of defendant, we are required to look at *only* the circumstances of the particular case. Therefore whether or not evading the police is inherently dangerous *in the abstract* is of no consequence to defendant, because we are only concerned with whether he himself *actually knew* it was dangerous.

Second, *Howard* holds that evading the police is not a felony that is inherently dangerous specifically for the purpose of the felony murder rule: "'A homicide that is a direct casual result of the commission of a felony *inherently dangerous to human life* (other than the . . . felonies enumerated in Pen. Code, § 189) constitutes at least second degree murder.' [Citation.] The rule 'eliminates the need for proof of malice in connection with a charge of murder.' [Citation.] It is not an evidentiary presumption but a substantive rule of law [citations], which is based on the theory that 'when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved.' [Citation.]" (*People v. Howard, supra*, 34 Cal.4th at p. 1135.)

The felony-murder rule means that a homicide committed during the course of certain conduct deemed inherently dangerous to human life will automatically be at least second degree murder *regardless* of the subjective intention of the defendant. This is what *People v. Howard* means when it says the rule eliminates the need for proof of

malice — because whether the defendant had malice or not doesn't matter. The problem with applying this reasoning to the instant case is that in the instant case we are *only* concerned with whether or not defendant had malice — it is fundamental. That *People v. Howard* held evading the police is not inherently dangerous for the purpose of the felony-murder rule does not help defendant. (*People v. Howard, supra,* 34 Cal.4th at. p. 1135.)

*E. Speed of Van & Application of Brakes*

Defendant raises the issue of conflicting evidence regarding the van's speed as it descended the off-ramp just prior to the collision, specifically that the defense expert testified the van travelled at approximately 41 miles an hour while the prosecution expert estimated the speed was approximately 65 to 70 miles an hour on the off-ramp. Conflicting evidence, of itself, does not mean the evidence the jury based its decision on was insubstantial. The jury was entitled to take the evidence presented by the expert witnesses and give that evidence whatever weight it deserved. (*People v. Simpson* (1954) 43 Cal.2d 553, 562-563.) That the jury preferred the prosecution's evidence over the defendant's does not make the evidence insubstantial.

In any event, the fact there was conflicting evidence regarding the van's speed does not help defendant, because the evidence of either expert could support the inference defendant knew the danger of his driving.

The higher rate of speed does not necessarily support the defense theory that the van's brakes failed unexpectedly, as defendant submits. It is equally possible, and in fact more likely when viewed in the context of defendant's driving throughout the evening, that defendant simply did not apply the brakes when travelling down the off-ramp. Such a finding would be consistent with defendant's pattern of reckless driving that led to the collision. Whether defendant knew of the poor condition of the van's brakes does not matter, because the evidence does not suggest they were even applied before the fatal collision.

Even if the jury chose to accept that defendant did slam on the brakes before the fatal collision, and through no fault of his own the brakes failed, this does not help defendant either. In *People v. Watson, supra,* 30 Cal.3d 290, the fact the defendant hit the brakes before the fatal collision "suggest[ed] an actual awareness of the great risk of harm which he had created." (*Id.* at p. 301.) That defendant slammed on his brakes, whether the brakes failed or not, supports the inference he knew the danger of his driving.

The requirements of gross vehicular manslaughter do not need discussion, as both parties, although for different reasons, concede that no other offense but second degree murder applies.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.